

STATE OF MICHIGAN  
IN THE SUPREME COURT

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HELEN YONO,

Plaintiff/Appellee,

v.

MICHIGAN DEPARTMENT OF  
TRANSPORTATION,

Defendant/Appellant.

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Supreme Court No. 150364

Court of Appeals Docket No.308968

Court of Claims No. 11-117-MD

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**APPELLEE'S REPLY BRIEF TO AMICUS CURIAE**

NOW COMES Appellee, by and through her attorneys, Smith & Johnson, Attorneys, P.C.,  
and hereby states for her Reply Brief to Amicus Curiae, as follows:

**Introduction**

Amicus Curiae invites this Court to adopt three (3) entirely new approaches to disposing  
of claims against the government. Respectfully, all three recommendations should be rejected by  
this Court, as contrary to existing law.

### 1. Pleading *and proving* facts in avoidance of governmental immunity

At the onset of litigation when the government moves for summary disposition instead of answering the complaint, Amicus Curiae recommends *in passim*, that an injured person not only must plead facts in avoidance of governmental immunity but that, without the benefit of discovery, must also *prove* his/her case then and now. Put more simply, flipping procedure on its head by requiring the complainant to try his/her case the second he/she files his/her complaint. It does this by extrapolating dicta from a pull quote cited by this Court in *Mack v City of Detroit*, 467 Mich 186 (2002). Yet, when one reads *Mack*, two (2) simple conclusion are drawn from it. First, this Court corrected a relatively recent change in the law by a prior panel of this Court that required a governmental agency to plead, as an affirmative defense, that it is immune. *Id*, p 200 (criticizing *McCummings v Hurley Medical Ctr*, 433 Mich 404 (1989)). Restoring the law to what it had always been, this Court reaffirmed that governmental immunity was absolute because it is a characteristic of government, and thus does not requiring specific defense pleading. *Id*, p 201-202.

In reaching its conclusion, this Court reviewed the nature and history of governmental immunity and that it has always been that “a plaintiff must plead her case in avoidance of immunity.” *Id*, p 198 (citing three noteworthy highway exception cases). Within its review, this Court pulled a quote from Justice Ryan’s opinion in *McCann v Michigan*, 398 Mich 65 (1976), which reaffirmed that pleading facts in avoidance of immunity was paramount; Justin Ryan, in passing, also added in only one of his topical sentences on the issue itself injected “plead and prove” facts, which is what Amicus Curiae herein is now advocating for as an entirely new standard. See *Mack*, p 199. But this Court in *Mack* did not adopt that dicta cited by the Amicus

Curiae; rather, this Court held -- consistent with longstanding jurisprudence -- that with respect to pleading a claim against the government, “a party suing a unit of government must plead in avoidance of governmental immunity.” *Id.*, 203. This Court did not (and the law does not) require, at the initial complaint pleading stage of proceedings, that the complainant must also try his/her case then and now by proving it immediately.

The second simple conclusion drawn from *Mack* was that this Court applied its stated “holding to plaintiff’s sexual orientation claim.” *Id.*, p 203 fn 20. Upon review of the plaintiff’s claims, this Court concluded that because she “makes no mention of governmental immunity with respect to any of her claims” in her complaint, she therefore “failed to state a claim that fits within a statutory exception *or plead facts* that demonstrate that the alleged tort occurred during the exercise or discharge of a governmental or proprietary function.” *Id.*, p 205 (emphasis supplied).

What Amicus Curiae now invites is not the law, has never been the law and should never be the law. As this Court stated in *Nawrocki*, although the complainant pleaded facts in avoidance of governmental immunity, it made clear that was not the end of the analysis in the case itself; rather, Mrs. Nawrocki still faced her remaining burden to prove her negligence theory that the road authority failed to repair and maintain the highway. *Id.* In this regard, this Court expressly stated at footnote 29,

“As noted by this Court in *Suttles*, 457 Mich. At 651, n. 10, 578 N.W.2d 295, simply falling within the highway exception is not the end of the analysis. After successfully pleading in avoidance of governmental immunity, a plaintiff still must prove a cause of negligence under traditional negligence principles. . . .” *Id.*

It is for this very reason that Appellee remains steadfast that *Nawrocki* remains dispositive. Consistent with the law, Appellee has pleaded facts in avoidance of governmental immunity.

## 2. An actionable defect must be *the* proximate cause of the injury complained of

At pages 15-16 of its brief, Amicus Curiae suggest that an injured person must now prove that the actionable defect was *the* proximate cause, as opposed to a proximate cause, of her injury complained of. The Amicus Curiae deliberately italicized the article “*the*” to make its recommendation clear to all who read it. This is new. Only tort claims against individual governmental employees require that that employee’s alleged gross negligence be “the” proximate cause of the injury; that is because the express language of the immunity exception says so. MCL 691.1407(2)(c); *Robinson v City of Detroit*, 462 Mich 439 (2000). Nowhere in MCL 691.1402 does it say that the government’s failure to maintain a highway in reasonable repair must be “the” proximate cause of the injury complained of. Grafting a term not within the statute onto the statute is frowned upon by this Court. *Nawrocki*, pp 175-177.

## 3. A parallel parking lane is *any other installation outside of the highway*

The Amicus Curiae stress that courts should “not resort to speculation about what should or should not be included as ‘part’ of a highway.” See, e.g., Amicus Curiae Brief, p 35. Yet, immediately preceding this stated virtue, the Amicus Curiae disembark from this principled footing and advocate the exact opposite by recommending that this Court to now park the parallel parking lane into the new category of other installations, despite this Court’s patently clear parallel parking lane decision in *Nawrocki*, *supra*. Again, there is no other logical interpretation of this Court’s express language in *Nawrocki* to suggest anything other than a parallel parking lane implicates the highway exception. Until this Court overturns *Nawrocki*, it is dispositive.

## Conclusion

In *Nawrocki*, this Court stated that it is compelled to follow the principle of adhering to

the plain language of the statute “rather than merely attempting to add still another layer of judicial gloss to those interpretations of the statute previously issued by this Court.” *Id.*, p 150. The companion case in *Nawrocki, Evans v Shiawassee County Rd Comm’r*, came before the Court, having been decided by the Court of Appeals under *Pick v Szymczak*, 451 Mich 607 (1996). Based upon the Court’s initial statements at the beginning of its opinion (i.e., to adhere to the plain language, avoid adding another layer of judicial gloss and to avoid further mischief by following prior erroneous, conflicting and contradictory decisions) the Court criticized the bases for decision in *Pick* and overruled it. Of the Court’s multiple criticisms of *Pick* included that the court “relied on judicially invented phrases nowhere found in the statutory clause” (*Id.*, pp 175 and 177) and that it “unacceptably departed from the plain language” of the statute. *Id.*, p 176. Respectfully, the Amicus Curiae engages in the very mischief this Court rejected in *Nawrocki*. Accordingly, its three new interpretive recommendations should be similarly rejected.

WHEREFORE, Appellee respectfully requests that this Honorable Court deny the Appellant’s application for leave.

Respectfully submitted,

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Dated: February 11, 2015.

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